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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 DARWIN A. SPEARS,
11 Plaintiff,
12 v.
13 JIM McDONNELL, et al.,
14 Defendants.
15
16

Case No. CV 17-4356 FMO(JC)

MEMORANDUM OPINION AND
ORDER DISMISSING ACTION

17
18 **I. BACKGROUND AND SUMMARY**

19 On June 12, 2017, plaintiff Darwin Spears, who is in custody, is proceeding
20 *pro se*, and has been granted leave to proceed *in forma pauperis*, filed a Civil
21 Rights Complaint (“Complaint”) pursuant to 42 U.S.C. § 1983 against multiple
22 defendants. On October 18, 2017, this Court screened the Complaint, notified
23 plaintiff of multiple deficiencies therein, dismissed the Complaint with leave to
24 amend and directed plaintiff, within twenty (20) days, to file a First Amended
25 Complaint or a signed Notice of Dismissal (“October Order”). The October Order
26 further expressly cautioned plaintiff in bold-faced print that the failure timely to
27 file a First Amended Complaint or a Notice of Dismissal may be deemed plaintiff’s
28 admission that amendment is futile and may result in the dismissal of this action,

1 with or without prejudice, on the grounds set forth in the October Order, on the
2 ground that amendment is futile, for failure diligently to prosecute, and/or for
3 failure to comply with the October Order.

4 As the October Order was returned undelivered on November 20, 2017, and
5 as the Magistrate Judge determined that plaintiff's address of record was
6 unchanged, but that his prisoner number had been changed (as he had apparently
7 been released and readmitted to the institution in issue), the Magistrate Judge, in an
8 order dated December 11, 2017 ("December Order") directed the Clerk to re-serve
9 plaintiff with the October Order, extended plaintiff's deadline to comply with the
10 October Order and to file either a First Amended Complaint or a Notice of
11 Dismissal to January 2, 2018, and again cautioned plaintiff in bold-faced print that
12 his failure timely to file a First Amended Complaint or a Notice of Dismissal may
13 be deemed plaintiff's admission that amendment is futile and may result in the
14 dismissal of this action on the grounds set forth in the October Order, on the
15 ground that amendment is futile, for failure diligently to prosecute this action,
16 and/or for failure to comply with the Court's Order. The December Order was not
17 returned. Plaintiff did not file a First Amended Complaint or a Notice of Dismissal
18 by the deadline set forth in the December Order.

19 As the Magistrate Judge learned on January 17, 2018, that the Clerk had
20 inadvertently failed to re-serve plaintiff with the October Order as called for by the
21 December Order, the Magistrate Judge, on the same date, issued another order
22 ("January Order") which again directed the Clerk forthwith to re-serve plaintiff
23 with the October Order, further extended to February 6, 2018, plaintiff's deadline
24 to comply with the October Order and to file either a First Amended Complaint or
25 a Notice of Dismissal, and again cautioned plaintiff in bold-faced print that his
26 failure timely to file a First Amended Complaint or a Notice of Dismissal may be
27 deemed plaintiff's admission that amendment is futile and may result in the
28 dismissal of this action on the grounds set forth in the October Order, on the

1 ground that amendment is futile, for failure diligently to prosecute this action,
2 and/or for failure to comply with the Court's Orders.

3 On February 14, 2018 and March 12, 2018, the Magistrate Judge granted
4 plaintiff's requests for extensions of time to file a First Amended Complaint or a
5 Notice of Dismissal (respectively "February Order" and "March Order") and
6 ultimately extended such deadline to April 15, 2018. The February and March
7 Orders again cautioned plaintiff in bold-faced print that his failure timely to file a
8 First Amended Complaint or a Notice of Dismissal may be deemed plaintiff's
9 admission that amendment is futile and may result in the dismissal of this action on
10 the grounds set forth in the October Order, on the ground that amendment is futile,
11 for failure diligently to prosecute this action, and/or for failure to comply with the
12 Court's Orders.

13 Plaintiff's latest extended deadline to file a First Amended Complaint or a
14 Notice of Dismissal expired on April 15, 2018 – more than two weeks ago. To
15 date, plaintiff has failed to file a First Amended Complaint or a Notice of
16 Dismissal.

17 **II. DISCUSSION**

18 Based upon the record and the applicable law, and as further discussed
19 below, the Court dismisses this action due to plaintiff's failure to state a claim
20 upon which relief can be granted, his failure to comply with the October Order
21 (with the extended deadlines afforded by the December, January, February and
22 March Orders), and his failure diligently to prosecute.

23 First, as explained in detail in the October Order, the Complaint failed to
24 state a claim upon which relief may be granted. The October Order explained in
25 detail what plaintiff needed to do to cure the deficiencies in his pleading. The
26 October Order, as extended by the December, January, February and March
27 Orders, granted plaintiff ample leave to file a First Amended Complaint to the
28 extent he was able to cure the multiple identified pleading deficiencies. The

1 October, December, January, February and March Orders all cautioned plaintiff
2 that the action may be dismissed if he failed timely to file a First Amended
3 Complaint or a Notice of Dismissal. Since plaintiff failed to file a First Amended
4 Complaint despite having been given an opportunity to do so, the Court can only
5 conclude that plaintiff is simply unable or unwilling to draft a complaint that states
6 viable claims for relief and deems such failure an admission that amendment is
7 futile. See, e.g., Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir. 2013) (“When a
8 litigant knowingly and repeatedly refuses to conform his pleadings to the
9 requirements of the Federal Rules, it is reasonable to conclude that the litigant
10 simply *cannot* state a claim.”) (emphasis in original), cert. denied, 135 S. Ct. 57
11 (2014). Accordingly, dismissal of the instant action based upon plaintiff’s failure
12 to state a claim is appropriate.

13 Second, dismissal is appropriate based upon plaintiff’s failure to comply
14 with the October Order, as extended by the December, January, February, and
15 March Orders, and the failure diligently to prosecute. It is well-established that a
16 district court may *sua sponte* dismiss an action where a plaintiff has failed to
17 comply with a court order and/or unreasonably failed to prosecute. See Link v.
18 Wabash Railroad Co., 370 U.S. 626, 629-33 (1962); Ferdik v. Bonzelet, 963 F.2d
19 1258, 1260 (9th Cir.) (as amended), cert. denied, 506 U.S. 915 (1992); see also
20 McKeever v. Block, 932 F.2d 795, 797 (9th Cir. 1991) (district court may *sua*
21 *sponte* dismiss action “only for an unreasonable failure to prosecute”) (citations
22 omitted); see also Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir.
23 2004) (*sua sponte* dismissal pursuant to Fed. R. Civ. P. 41(b) proper sanction in
24 cases where a plaintiff is notified of deficiencies in complaint and is given “the
25 opportunity to amend [the complaint] or be dismissed” but the plaintiff “[does]
26 *nothing*”) (citations omitted; emphasis in original).

27 In determining whether to dismiss an action for failure to prosecute or
28 failure to comply with court orders, a district court must consider several factors,

1 namely (1) the public's interest in expeditious resolution of litigation; (2) the
2 court's need to manage its docket; (3) the risk of prejudice to the defendant;
3 (4) the public policy favoring disposition of cases on their merits; and (5) the
4 availability of less drastic alternatives. See In re Eisen, 31 F.3d 1447, 1451 (9th
5 Cir. 1994) (failure to prosecute); Ferdik, 963 F.2d at 1260-61 (failure to comply
6 with court orders). Dismissal is appropriate "where at least four factors support
7 dismissal . . . or where at least three factors 'strongly' support dismissal."
8 Hernandez v. City of El Monte, 138 F.3d 393, 399 (9th Cir. 1998) (citations
9 omitted).¹ Here, as at least the first three factors strongly support dismissal, the
10 Court finds that plaintiff's unreasonable failure to prosecute his case and failure to
11 comply with the October Order, as extended by the December, January, February
12 and March Orders, warrants dismissal.

13 **III. ORDER**

14 IT IS THEREFORE ORDERED that this action is dismissed and that the
15 Clerk enter judgment accordingly.

16 DATED: May 11, 2018

17
18 _____/s/_____
19 HONORABLE FERNANDO M. OLGUIN
20 UNITED STATES DISTRICT JUDGE
21
22
23 _____

24 ¹Where a plaintiff is proceeding *pro se*, a court must first notify the plaintiff of the
25 deficiencies in the complaint so that the plaintiff has an opportunity "to amend effectively."
26 Ferdik, 963 F.2d at 1261 (citation omitted). A district judge may not dismiss an action for
27 failure to comply with a court order or for unreasonable failure to prosecute if the initial decision
28 to dismiss a complaint was erroneous. Yourish v. California Amplifier, 191 F.3d 983, 992 (9th
Cir. 1999) (citing id.). Here, as noted above, plaintiff was notified of the deficiencies in the
Complaint and afforded the opportunity to amend effectively. Further, the October Order was
not erroneous.